IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 14-0015

GREGORY A. CHRISTIAN; MICHELLE D. CHRISTIAN; ROSEMARY CHOQUETTE; DUANE N. COLWELL; SHIRLEY A. COLWELL; FRANKLIN J. COONEY; VICKI COONEY; GEORGE COWARD; SHIRLEY COWARD; JACK E. DATRES; SHEILA DORSCHER; VIOLA DUFFY; BRUCE DUXBURY; JOYCE DUXBURY; BILL FIELD; CHRIS FIELD; ANDREW GRESS AND FRANK GRESS AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES GRESS; CHARLES GUSTAFSON; MICHAEL HENDRICKSON; PATRICE HOOLAHAN; SHAUN HOOLAHAN; ED JONES; RUTH JONES; BARBARA KELSEY; MYRTLE KOEPPLIN; BRENDA KRATTIGER; DOUG KRATTIGER; JULIE LATRAY; LEONARD MANN; VALERIE MANN; KRISTY MCKAY; RUSS MCKAY; BRYCE MEYER; MILDRED MEYER; JUDY MINNEHAN; TED MINNEHAN; DIANE MORSE; RICHARD MORSE; KAREN MULCAHY; PATRICK MULCAHY; NANCY MYERS; SERGE MYERS; LESLIE NELSON; RON NELSON; JANE NEWELL; JOHN NEWELL; GEORGE NILAND; LAURIE NILAND; DAVID OSTROM; ROSE ANN OSTROM; JUDY PETERS; TAMMY PETERS; ROBERT PHILLIPS; TONI PHILLIPS; CAROL POWERS; WILLIAM D. POWERS; GARY RAASAKKA; MALISSA RAASAKKA; ALEX REID; KENT REISENAUER; PETE REISENAUER; SUE REISENAUER; LARRY RUPP; JOHN A. RUSINSKI; KATHRYN RUSINSKI; EMILY RUSS; SCOTT RUSS; CARL RYAN; PENNY RYAN; RICH SALLE; DIANE SALLE; DALE SCHAFER; DAVID D. SCHLOSSER; ILONA M. SCHLOSSER; MICHAEL SEVALSTAD; JIM SHAFFORD; ROSEMARIE SILZLY; ANTHONY SOLAN; KEVIN SORUM; DON SPARKS; VICKIE SPEHAR; ZANE SPEHAR; CARA SVENDSEN; CARON SVENDSEN; JAMES H. SVENDSEN, SR.; JAMES SVENDSEN, JR.; DOUG VIOLETTE; ESTER VIOLETTE; CAROL WALROD; CHARLES WALROD; DARLENE WILLEY; KEN YATES; SHARON YATES; LINDA EGGEN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM YELSA AND AS GUARDIAN OF MAURINE YELSA; DAVID ZIMMER; and TONI ZIMMER,

Plaintiffs/Appellants,

vs.

ATLANTIC RICHFIELD COMPANY,

Defendant/Appellee.

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, Cause No. DV-08-173BN
Honorable Bradley G. Newman, District Court Judge

APPELLANTS' BRIEF

APPEARANCES:

Tom L. Lewis
J. David Slovak
Mark M. Kovacich
LEWIS, SLOVAK & KOVACICH, PC
P.O. Box 2325
Great Falls, MT 59403
(406) 761-5595
(406) 761-5805 - fax
tom@lsklaw.net
dave@lsklaw.net
mark@lsklaw.net

Monte D. Beck
Justin P. Stalpes
Lindsay C. Beck
BECK & AMSDEN, PLLC
1946 Stadium Drive, Suite 1
Bozeman, MT 59715
(406) 586-8700
(406) 586-8960 - fax
mbeck@becklawyers.com
justin@becklawyers.com
lbeck@becklawyers.com

Attorneys for Plaintiffs/Appellants

John P. Davis
POORE, ROTH & ROBINSON, P.C.
P.O. Box 2000
Butte, MT 59702
(406) 497-1200
(406) 782-0043 - fax
jpd@prrlaw.com

Michael J. Gallagher
Shannon Wells Stevenson
Jonathan W. Rauchway
Mark Champoux
DAVIS, GRAHAM & STUBBS, LLP
1550 17th Street, Suite 500
Denver, CO 80202
(303) 892-7216
(303) 893-1379 - fax
mike.gallagher@dgslaw.com
shannon.stevenson@dgslaw.com
jrauchway@dgslaw.com
mark.champoux@dgslaw.com

Attorneys for Defendant/Appellee

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STATEMENT OF ISSUE

Whether the District Court erred by granting summary judgment to Atlantic Richfield Company (ARCO) based on the statute of limitations where:

- The ongoing presence of reasonably abatable pollution constitutes a continuing tort;
- Reasonable abatability must be determined by the trier of fact;
- Abatement can be accomplished for less than 0.22% of ARCO's assets;
- Abatement can be accomplished in less than two years;
- The tons of arsenic contamination left on Appellants' residential property pose an unacceptable health risk, as conceded by ARCO in many cases; and,
- Due to the insidious characteristics of arsenical contamination and ARCO's repeated assertion that Opportunity was clean, Appellants were not aware of the nature and extent of contamination on their properties before this litigation.

STATEMENT OF THE CASE

The Appellants (Opportunity Citizens) own property in and around Opportunity, Montana, within a few miles generally east of a former copper smelter operated by ARCO's predecessor, The Anaconda Company. ARCO admits it

"succeeded to the liabilities of The Anaconda Company." Answer, p. 4 (CR 65).[1] Throughout the life of its operation, the smelter emitted smoke and fumes containing hundreds of thousands of tons of arsenic and other toxic metals. Pl.s' Resp. to MSJ, Ex. 5, pp. 109-110 (CR 349). For decades, the smelter emitted 6-10 tons of arsenic per day. Pl.s' Resp. to MSJ, Ex., 5, pp. 61-62 (CR 349). Emissions from the smelter resulted in widespread pollution of soil and groundwater surrounding the smelter, including the soil and groundwater on the Opportunity Citizens' properties. Pl.'s Exp. Wit. Discl. (App. 2:67-68; App. 3:225).

The extent of pollution in Opportunity can be quantified by comparing the amount of arsenic in the top two feet of the soil column to the level of naturally occurring arsenic, referred to as the "background" level, which would exist in the soil regardless of whether the smelter operated. According to the Opportunity Citizens' and some of ARCO's own estimates, the naturally occurring "background" level of arsenic in Opportunity is approximately 6-16 ppm. Pl.s' Exp. Wit. Discl. (App. 2:66-67; ARCO's MSJ Reply (App. 8:618-619). As discussed in more detail below, the average level of arsenic in Opportunity as a result of the smelter, even according to ARCO, is 110.5 ppm, with several properties testing in excess of 1,000 ppm.

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[1]Citations to the court record reference the title followed by the appendix number (App.) or the District Court record (CR).

On April 17, 2008, the Opportunity Citizens filed this action against ARCO seeking compensation for the damage to their properties caused by ARCO's former industrial activities and resulting pollution. ARCO moved for summary judgment, arguing all of the Opportunity Citizens' claims are barred by the statute of limitations. On December 16, 2013, the District Court granted ARCO's motion, and entered summary judgment against the Opportunity Citizens. The Opportunity Citizens opposed ARCO's motion and file this timely appeal because questions of fact concerning whether the statute of limitations was tolled by both the continuing tort doctrine and the discovery doctrine preclude summary judgment.

STATEMENT OF FACTS

From 1902 until 1980, ARCO's predecessor operated a copper smelter in Anaconda, Montana, processing millions of tons of ore stripped from mines in the area. ARCO's operations spread hundreds of thousands of tons of arsenic and other toxic metals throughout the region, resulting in pollution of unprecedented scale. Substantial quantities of arsenic and other toxic metals, originating from ARCO's activity, remain in the soil and groundwater on the Opportunity Citizens' properties. Pl.s' Exp. Wit. Discl. (App. 2:11,36-37).

Although ARCO has been "investigating" the pollution caused by its operations for approximately 30 years, ARCO has failed to cleanup the arsenic and

other contaminants deposited on the Opportunity Citizens' properties. Importantly, ARCO avoided any obligation to cleanup the arsenic by failing to appropriately test the soil and water in Opportunity.

ARCO acknowledges that environmental investigations conducted in various parts of the upper Clark Fork River basin revealed extensive pollution caused by the smelter. These areas have been the subject of well-publicized remedial efforts. However, ARCO has consistently maintained that the community of Opportunity is clean. Pl.s' Resp. to MSJ (App. 7:569); Pl.s' Resp. to MIL No. 4 (App. 9:624); Pl.s' Resp. to MSJ (App. 5:249-379). In 1996, ARCO took the position that sampling was not even necessary in Opportunity. Pl.s' Resp. to MSJ (App. 7:570-577). In the following years, when a handful of Opportunity residents requested evaluation of their properties, ARCO performed limited sampling and sent letters advising the properties were not polluted. Pl.s' Resp. to MSJ (App. 5:273-379). While many Opportunity Citizens understood ARCO's operations polluted certain areas in Deer Lodge and Silver Bow Counties, none of them appreciated the smelter's impact on their own properties. Pl.s' Resp. to MSJ (App. 7:426-560). Furthermore, by affirmatively representing that Opportunity was clean, ARCO discouraged any independent investigation or action by the Opportunity Citizens for years.

ARCO did not thoroughly test the Opportunity Citizens' properties until experts retained in connection with this litigation recently confirmed not only that elevated arsenic is present throughout the soil in and around Opportunity, but also that ARCO's earlier representations concerning the extent of arsenic on certain properties were false. A number of years ago, ARCO concluded that "background" levels of arsenic in Opportunity soil range between 6 and 16 ppm. The Opportunity Citizens' consultant calculated a very similar "background" concentration for arsenic in area soil. Pl.s' Exp. Wit. Discl. (App. 2:66-67). Testing completed by ARCO's own experts in this litigation revealed that the average level of arsenic is now 110.5 ppm. Pl.'s Resp. to MSJ (App. 6:391-412). ARCO's testing identified several properties with soil exceeding 1,000 ppm arsenic. Pl.s' Resp. to MSJ (App. 6:383-388). While ARCO maintains the health of the Opportunity Citizens is not at risk unless arsenic levels in their soil exceed 250 ppm, the soil on at least 41 of the Opportunity Citizens' properties exceeds 250 ppm according to ARCO's own testing. Pl.s' Resp. to MSJ (App. 6:391-412).

Although ARCO's pollution in and around Opportunity is extensive, undisputed evidence demonstrates that it can, and should, be cleaned up. The Opportunity Citizens retained experts who will testify the contamination on their properties can be removed, utilizing standard and accepted cleanup technologies, at

costs ranging from $37 million to $101 million. Pl.s' Exp. Wit. Discl. (App. 2:75); Pl.s' Second Supp. Exp. Wit. Discl. (App. 4:230). While ARCO contends cleaning up Opportunity would be unreasonably expensive, ARCO's 2012 assets totaled more than $16.23 billion. Although ARCO minimizes the impact of its pollution and maintains extensive cleanup would be unreasonable, its expert concedes that cleanup is feasible and can be performed using accepted methods. Folkes depo (App. 10:655). In fact, ARCO has employed similar methods to cleanup arsenic and lead contamination in hundreds of residential yards in Anaconda, and even some in Opportunity. ARCO concedes a complete cleanup of Opportunity would take less than two years. ARCO's MSJ Br., p. 3 (CR 308).

STANDARD OF REVIEW

This Court must review the District Court's order granting summary judgment to ARCO *de novo*. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 11, 361 Mont. 269, 258 P.3d 410. In doing so, the Court should apply the same Rule 56, M.R.Civ.P., criteria as the District Court. *Estate of Willson*, ¶ 11.

Summary judgment is an extreme remedy and "should never be substituted for a trial if a material factual controversy exists." *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont. 507, 155 P.3d 1241. ARCO has the burden of demonstrating the absence of any genuine issue of material fact. Only when ARCO has met that burden,

does the burden shift to the Opportunity Citizens to show the existence of factual issues. All evidence must be viewed in the light most favorable to the Opportunity Citizens and all reasonable inferences drawn in favor of the Opportunity Citizens. *Sands v. Town of West Yellowstone*, 2007 MT 110, ¶ 17, 337 Mont. 209, 158 P.3d 432.

SUMMARY OF ARGUMENT

The District Court's holding that the Opportunity Citizens' claims are barred by the three year statute of limitations is based on conclusions of law which are simply wrong and unfounded findings of fact which should have been left for the jury. Under Montana law, the continued presence of reasonably abatable pollution on the property of another subjects the polluter to liability for a continuing tort. *Burley v. Burlington Northern & Santa Fe Railway Co.*, 2012 MT 28, ¶ 99, 364 Mont. 77, 273 P.3d 825. The statute of limitations cannot run on a continuing tort, unless and until the pollution is removed. Pollution from ARCO's former operations remains on the Opportunity Citizens' properties, and whether the pollution is reasonably abatable is a question for the jury. *Burley*, ¶¶ 91-92.

In addition to usurping the jury's role, the Court found the continuing tort doctrine did not apply because EPA did not approve the Opportunity Citizens' abatement plan pursuant to the Comprehensive Environmental Response,

Compensation and Liability Act (CERCLA). As discussed below, CERCLA supplements but does not preempt state law claims. EPA's enforcement of CERCLA has no bearing on the continuing tort doctrine under Montana common law.

Additionally, the statute of limitations could not begin to run until the Opportunity Citizens discovered, or should have discovered, the facts constituting their claims. § 27-2-102(3)(a), MCA. The District Court relied on facts which do not establish that any Opportunity Citizen was aware of damage to his or her property. For example, the Court noted that smelter smoke was visible from Opportunity more than 30 years ago, that the area surrounding the Anaconda smelter was designated as a superfund site 30 years ago, and that farmers in the Deer Lodge Valley sued the Anaconda Company over 100 years ago. However, the Court disregards the fact that ARCO more recently represented to many Opportunity Citizens and the public that the community of Opportunity was clean, lulling the Opportunity Citizens into complacency and obviating any "awareness" certain citizens had of prior events.

ARGUMENT

I. Under Montana law, the ongoing presence of reasonably abatable pollution constitutes a continuing tort.

"Whether or not the two-year statute of limitations can be tolled in a nuisance case depends upon whether it is a permanent, temporary, or continuous nuisance."

Graveley Ranch v. Scherping, 240 Mont. 20, 23, 782 P.2d 371, 373 (1989). "[I]f the nuisance is of a temporary, continuing nature, the statute of limitations is tolled until the source of the injury is abated." *Knight v. City of Missoula*, 252 Mont. 232, 244, 827 P.2d 1270, 1277 (1992). A nuisance is continuing when the offending party could have abated it by taking curative action – a terminable nuisance cannot be deemed permanent. *Walton v. City of Bozeman*, 179 Mont. 351, 357, 588 P.2d 518, 521 (1978). Likewise, with respect to trespass, an actor's failure to remove something tortiously placed on another's land is considered a "continuing trespass" for the entire time the object remains on the land. Restatement (Second) of Torts, § 161, cmt. b.

In *Burley*, this Court clarified the continuing tort doctrine as applied to claims for property damage from environmental pollution. In *Burley*, property owners in Livingston, Montana, filed claims against the railroad, seeking restoration and other damages based on pollution placed on their properties. The defendant argued, like ARCO in this case, the statute of limitations had run because the plaintiffs were allegedly aware of the pollution for more than three years before filing suit. On a certified question from the United States District Court for the District of Montana, this Court affirmed its prior case law concluding a nuisance or trespass which is temporary in nature constitutes a continuing tort. *Burley*, ¶ 14. Further, the Court

held in cases involving property damage from environmental pollution, the nuisance or trespass is temporary as long as the pollution is reasonably abatable. *Burley*, ¶ 99. Thus, in Montana, the law is now clear that the statute of limitations cannot run on a claim for property damage from environmental pollution as long as the pollution is reasonably abatable.

A. ARCO's cessation of actively polluting the Opportunity Citizens' property did not trigger the running of the statute of limitations.

In its order granting summary judgment to ARCO, the District Court notes that "operations at the Anaconda Smelter ceased in 1980." Order (App. 11:663). In the brief supporting its summary judgment motion, ARCO similarly stressed, "[a]ll of the conduct Plaintiffs complain of occurred between 1884 and 1980, and ceased when smelter operations ceased." Based on the cessation of smelter operations in 1980, ARCO argued, "[b]ecause Plaintiffs' claims accrued, at the latest, three decades ago, their claims are barred by the applicable statutes of limitations." ARCO's MSJ Br., p. 13 (CR 308). ARCO's argument, endorsed by the District Court, ignores controlling Montana Supreme Court authority, holding the statute of limitations does not run on claims for property damage from pollution simply because the polluter is no longer actively contributing contamination to the property.

In *Graveley*, the defendants' residence burned to the ground in September, 1984, leaving lead batteries exposed to the Graveley Ranch's neighboring pastures. Between 1985 and the end of 1986, several of the Graveley Ranch's cows died from lead poisoning. On November 4, 1985, the Graveley Ranch received notification that the State pinpointed the defendants' exposed foundation as the source of the lead poisoning. The Graveley Ranch admitted knowledge of this fact as early as September 25, 1985. On October 29, 1987, the Graveley Ranch filed suit. The district court concluded the two year statute of limitations had expired and granted the defendants' motion for summary judgment.

On appeal, this Court reversed, concluding:

> Here, although the plaintiff's injury is traceable to a single nonrecurring event, the continuing presence of the exposed batteries created an ongoing hazard potentially injurious to health and interfering with plaintiff's use of the land for grazing. This hazardous situation could have been readily abated by removing the ruptured batteries from the site and cleaning the foundation walls. Thus, . . . because the nuisance was terminable through cleaning of the site, it cannot be deemed to be a permanent nuisance as of the date of the fire.

Graveley, 240 Mont. at 24, 782 P.2d at 374.

The "single nonrecurring event" identified by the Court was the burning of the structure, thereby exposing the ongoing hazard (the batteries). *Graveley* did not hold the statute of limitations had run because the home ceased burning years prior to the

harm inflicted by the exposed batteries. Rather, the continuing tort doctrine applied because the "continuing presence of the exposed batteries created an ongoing hazard potentially injurious to health and interfering with the plaintiff's use of the land for grazing." *Graveley*, 240 Mont. at 24, 782 P.2d at 374.

In *Burley*, the defendant railroad similarly argued the statute of limitations had run on the plaintiffs' claims because it stopped contributing pollution to the site many years earlier. Following a discussion of its prior case law, including *Graveley*, the Court rejected the railroad's argument, "decline[ing] to follow the reasoning that once the tortfeasor has stopped adding to the nuisance the injury should be deemed permanent." *Burley*, ¶ 72. In this case, the fact that ARCO stopped adding pollution to the Opportunity Citizens' properties some time ago does not trigger running of the statute of limitations.

B. Abatable pollution gives rise to a continuing tort regardless of whether the pollution is "migrating."

In its order, the District Court concludes the continuing tort doctrine cannot apply unless the nuisance or trespass at issue "continues to migrate . . ." Order (App. 11:665). In *Burley*, the certified question from the federal court referenced migration of the pollution at issue, and the evidence demonstrated the pollution did migrate on a molecular level. *Burley*, ¶¶ 2, 52. The evidence also demonstrated that the plume

had "stabilized" and that pollutant concentrations within the plume were not increasing. *Burley*, ¶ 20. Although the Court recognized the pollution at issue in *Burley* did migrate, its analysis of the continuing tort doctrine focused on whether the pollution was temporary or permanent. Ultimately, the Court held a temporary nuisance or trespass constitutes a continuing tort, and the ongoing presence of pollution is temporary when found to be reasonably abatable. *Burley*, ¶¶ 89-91.

In reaching its conclusion in *Burley*, the Supreme Court extensively discussed and relied upon its prior continuing tort decisions, including *Graveley* and *Shors v. Branch*, 221 Mont. 390, 720 P.2d 239 (1986). In *Graveley*, the continuing nuisance tolling the statute of limitations consisted of batteries sitting in the foundation of a burned structure. The nuisance was temporary and continuing, because the batteries could be removed and therefore abated. *Graveley*, 240 Mont. at 24, 782 P.2d at 374.

In *Shors*, a developer placed a locked gate across a road intended to provide lot owners access to the middle fork of the Flathead River. One of the lot owners, Shors, asserted a nuisance claim against the developer several years later. The developer argued the statute of limitations barred the claim, and this Court disagreed. The Court held the gate constituted a temporary and continuing nuisance, because it could have been removed and therefore abated. *Shors*, 221 Mont. at 397, 720 P.2d at 243-44.

Although the gate and batteries at issue in *Shors* and *Graveley* did not migrate, both constituted temporary, continuing nuisances based on their abatability.

In *Burley*, the Court recognized the continuing nature of a nuisance is not dependent on migration:

> *Graveley I* supports the notion that a tortfeasor need not add to the nuisance for it to be classified as continuing. The Court determined that the nuisance continued each day even without the defendant's addition of more leaking batteries. Not all of the Montana nuisance cases that we have discussed herein, however, address directly the effect of the continuing migration of a nuisance on the question of whether to classify the nuisance as temporary or permanent.
>
> For example, the gate in *Shors* involved a permanent structure that did not move. The Court nevertheless classified the nuisance as temporary due to the fact that the developer could have removed the gate to abate the nuisance.

Burley, ¶¶ 69-70 (citations omitted). Thus, although the Court's conclusion discusses a nuisance that migrated on a molecular level, based on the facts of the case, *Burley's* holding focuses on abatability and not migration.

C. The pollution at issue is migrating.

Furthermore, although the continuing nature of ARCO's nuisance and trespass is not dependent on migration, the pollution at issue is migrating. For example, according to an EPA consultant, "[t]he main pathways for mobilization of arsenic from the soil source to ground water are the direct contact of ground water with

contaminated soil **causing leaching and lateral flow** of ground water through soil." Technical Impracticability Evaluation Rpt., located in the Administrative Record at 1211309–R8 SDMS, p. 6-3 (App. 1:3) (emphasis added). The Opportunity Citizens' expert, John Kane, likewise determined that the source of the arsenic contamination in the Opportunity Citizens' groundwater is leaching and lateral flow.[2] To explain, Mr. Kane opined that when water, introduced by rain or irrigation, filters through soil contaminated by the smelter, leaching occurs moving contaminants from soil into the groundwater. A similar process occurs when water passes through waste material from the smelter, deposited by ARCO in railroad beds, holding ponds (such as the Blue Lagoon), and old transport ditches (the Yellow Ditch). Pl.s' Exp. Wit. Discl. (App. 2:70).

To restore the groundwater on the Opportunity Citizens' properties to pre-smelter conditions, Mr. Kane recommended installing several permeable reactive barrier walls (PRB walls). As contaminated groundwater flows through the PRB walls, which would be strategically placed up-gradient of the Opportunity Citizens' properties, the walls intercept the water and filter out arsenic and other harmful contaminants. Pl.s' Exp. Wit. Discl. (App. 2:73). Mr. Kane has also recommended

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[2]Even ARCO's expert, David Folkes, acknowledges a factual dispute concerning whether contamination on the Opportunity Citizens' property is "due to lateral migration of arsenic in groundwater. . ." ARCO's MSJ Br., Ex. R, at 16 (CR 308).

removing the contaminated top two feet of soil in Opportunity and replacing it with clean fill, addressing not only the soil contamination on the properties, but also removing a major source of ongoing contamination to groundwater through leaching. Pl.s' Exp. Wit. Discl. (App. 2:72-73).

The record in this case clearly establishes migration, very similar to the migration of contaminants addressed in *Burley*. In this case, arsenic continues to leach from the soil into the groundwater, and the contaminated groundwater plume continues to move down-gradient with a lateral flow. Pl.s' Exp. Wit. Discl. (App. 2:68-71). The District Court erred by finding no migration of ARCO's pollution as a matter of law.

D. A temporary nuisance need not be easy or inexpensive to abate.

Although the District Court cited *Burley*, and discussed the reasonable abatement standard set forth therein, it nonetheless accepted ARCO's argument that the damage to the Opportunity Citizens' property is permanent, based on the expense and difficulty associated with removing the pollution. Order (App. 11:667). Its conclusion runs directly contrary to *Burley* and other Montana Supreme Court decisions. A full reading of the Court's continuing tort decisions reveals its intent to hold parties who create nuisances responsible for any length of time during which the nuisance can be abated. See *Graveley*, 240 Mont. at 24, 782 P.2d at 374 ("[B]ecause

the nuisance was terminable through cleaning of the site, it cannot be deemed to be a permanent nuisance."); *Walton*, 179 Mont. at 356, 588 P.2d at 521 ("[T]he damages caused here were a continuing nuisance and as such were within the applicable statute of limitations, because at all times, the City could have abated the nuisance by taking curative action.").

The public policy behind this Court's pronouncements is simple. When one party creates a condition infringing on the property rights of another, and the condition can be corrected, the responsible party should correct the condition regardless of how long it has existed. Under the rule ARCO advocates, the law would excuse a polluter from cleaning up its mess whenever the mess is really big and/or cleanup is costly. In *Sunburst School Dist. No. 2 v. Texaco, Inc.*, Montana Eighth Judicial District Court, Cause No. CDV-01-179, the trial court rejected the proposition that pollution is permanent where cleanup is costly:

> Texaco argues the nuisance is permanent because it is not "readily abatable." It agrees the nuisance can be abated but asks the Court to find the nuisance permanent because abatement will be expensive and lengthy. The policy of the law is to require parties responsible for creating a nuisance to discontinue the nuisance. Nothing in the law supports restricting that policy to cases where abating the nuisance is easy or inexpensive.

Pl.s' Resp. to MSJ (App. 7:561-564).

In *Burley*, the polluter similarly argued its pollution was permanent because cleanup would be difficult and expensive. The Court soundly rejected the polluter's argument, holding "[a] tortfeasor who impairs the property rights of another should not prevail simply because its pollution or interference with another's property takes a lengthy amount of time or a large amount of money to abate." *Burley*, ¶ 100. Ultimately, the Court concluded a nuisance is temporary and continuing when "reasonably abatable," which is precisely the case here. *Burley*, ¶ 99.

E. Reasonable abatability must be determined by the trier of fact.

Directly contrary to the relief awarded by the District Court, *Burley* held reasonable abatability is a question of fact, which must be resolved by the jury. Based on facts very similar to the facts of this case, this Court could not have been more clear in stating the jury must determine whether pollution is reasonably abatable:

> **The trier of fact must determine whether the cost of abatement would be reasonable under the circumstances. Reasonableness generally presents a question of fact for the trier of fact to weigh the evidence and judge the credibility of the witnesses.**
>
> * * * * *
>
> We recognize the potential inconvenience to a district court of having the jury resolve factual disputes that implicate a potentially dispositive statute of limitations affirmative defense. A district court may be required to hold in abeyance any ruling on the statute of limitations affirmative defense until the jury first determines whether the

> nuisance reasonably can be abated and thereby the nuisance qualifies as a continuing tort.

Burley, ¶¶ 91-92 (emphasis added).

In this case, the jury should likewise determine whether cleaning up ARCO's pollution would be reasonable. The District Court clearly erred by finding no questions of fact exist.

F. ARCO's contamination is reasonably abatable.

In determining whether pollution giving rise to property damage claims is temporary or permanent, the jury must consider whether abatement can "be accomplished without unreasonable hardship or expense," the type of property affected, the severity of contamination, and the length of time necessary to remediate the pollution. *Burley*, ¶¶ 82, 89. Presenting a lengthy but one-sided version of disputed facts, ARCO asked the District Court to usurp the jury's role and hold its pollution is not reasonably abatable as a matter of law. Ignoring several factual disputes, and making no reference to the Opportunity Citizens' factual arguments, the District Court accepted ARCO's invitation. However, as discussed herein, the contamination at issue is, in fact, reasonably abatable.

1. Abatement can be accomplished without unreasonable hardship or expense.

In *Burley*, the Court relied on the Restatement (Second) of Torts, which defines an "abatable physical condition" as an abatement that could be "accomplished without unreasonable hardship or expense." *Burley*, ¶ 83. In this case, abatement can be accomplished without imposing an unreasonable hardship or expense. Throughout its summary judgment briefing, ARCO referenced the top-end cost of cleanup identified by the Opportunity Citizens' consultant, $101 million. However, based on ARCO's agreement to allow soil disposal in its local waste repository between Opportunity and Anaconda, the same consultant calculated an alternative cleanup cost of $37 million. Folkes depo (App. 10:656-657); Pl.s' Second Supp. Exp. Wit. Discl. (App. 4:226-245). While the Opportunity Citizens disagree with his approach, ARCO's expert has also estimated cleanup costs ranging from $2.2 million to $5.4 million. ARCO's MSJ Br., Ex. R, pp. 3-4 (CR 308). The collective value of the Opportunity Citizens' property according to ARCO's appraiser is $8.3 million. ARCO's MSJ Br., Ex. C, pp. 37-42 (CR 308).

In *Sunburst School Dist. No. 2 v. Texaco*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, this Court found restoration damages of $15 million reasonable as a matter of law, where the impacted property had a collective value of $2 million. *Sunburst*,

¶ 49. The ratio between cleanup cost and property value is considerably more reasonable in this case. Analyzing similar facts in *City of Livingston v. BNSF Railway Co.*, Montana Sixth Judicial District Court, Cause No. DV 07-141, the court held the pollution at issue reasonably abatable, despite cleanup costs ranging from $38 million to $67 million. Pl.s' Resp. to MSJ (App. 7:565-567).

Here, faced with evidence of cleanup costs ranging from $2.2 million to $37 million, and in light of ARCO's substantial wealth, the jury should consider whether abatement can be accomplished without imposing unreasonable hardship or expense on ARCO. The District Court committed reversible error by determining, as a matter of law, abatement is unreasonable.

2. The Opportunity Citizens have personal reasons for cleaning up their irreplaceable properties, supporting restoration as a reasonable remedy.

The next factor the jury must consider in determining whether abatement is reasonable is the type of property contaminated by the defendant. In this case, the contaminated property is almost exclusively residential property where the Opportunity Citizens have built their homes, raised their children, and resided for many years. The Opportunity Citizens consistently testified the primary goal of this lawsuit is to cleanup their properties. Pl.s' Resp. to MSJ, Ex. 1 (CR 239). Because

the Opportunity Citizens live on the polluted properties, they are entitled to restoration damages. *Sunburst*, ¶ 34.

The District Court did not even acknowledge that the vast majority of the Opportunity Citizens' properties are residential. The District Court also failed to recognize that the *only* remedy that would afford the Opportunity Citizens full compensation would be restoration damages. *Sunburst*, ¶ 34. Instead, the District Court determined as a matter of law that no jury could find abatement to be reasonable under the circumstances. The Court's finding was inconsistent with Montana law and must be reversed.

3. ARCO's contamination is severe.

The jury must next consider the severity of the contamination at issue. Arsenic is a known carcinogen. Pl.s' Resp. to MSJ (App. 6:390). According to the CDC, "prolonged arsenic exposure causes skin and lung cancer and may cause other cancers as well." Pl.s' Resp. to MSJ (App. 6:415-416). The State of Montana's cleanup level for arsenic in soil (based on the "background" level of arsenic in the State and the acceptable cancer risk) is 40 ppm. Pl.s' Resp. to MSJ (App. 6:417-419). In other words, the State of Montana has determined that soil carrying more than 40 ppm arsenic poses an unacceptable cancer risk to individuals living on that soil.

The average arsenic concentration in the top two feet of soil on the Opportunity Citizens' property is 110.5 ppm. Pl.s' Second Supp. Exp. Wit. Discl. (App. 4:238); Pl.s' Exp. Wit. Discl. (App. 2:63-75). Arsenic concentrations in the soil on some Opportunity Citizens' properties exceed 1,000 ppm. Pl.s' Exp. Wit. Discl. (App. 2:63-75).

The Opportunity Citizens disclosed expert opinions offered by toxicologist Rick Pleus, who will testify that ARCO's pollution poses an "unacceptable" risk of cancer to the residents of Opportunity and Crackerville. Pl.s' Exp. Wit. Discl. (App. 2:79); Pl.s' Resp. to MSJ (App. 6:414). Dr. Pleus will testify the cleanup level proposed by ARCO, i.e., 250 ppm arsenic, is not scientifically defendable and will not eliminate the residents' unacceptable risk of cancer. Pl.s' Resp. to MSJ (App. 6:421).

Dr. Pleus' approach has been employed in many other parts of the country, where arsenic in residential soil has been found sufficiently hazardous to justify cleanup to background concentrations. Bartelt depo (App. 10:630). In Minneapolis, for example, the EPA required a polluter to remove arsenic exceeding 25 ppm from residential property, and to remove any arsenic exceeding 95 ppm on the property on an expedited basis to eliminate a short-term health risk. Bartelt depo (App. 10:631-632,647-650).

Similarly, in Chicago, on another site where ARCO is the responsible party, the cleanup level for arsenic in residential soil was based on a background concentration of 26 ppm. Bartelt depo (App. 10:629-630,633-646). Further, ARCO's expert, David Folkes, who opines any cleanup in Opportunity below 250 ppm is unreasonable, worked as the project manager on a site in Colorado where residents were offered cleanup to a background concentration of 28 ppm for arsenic. Folkes depo (App. 10:652-654).

In support of its conclusion that reasonable abatability should be determined as a matter of law, the District Court accepted ARCO's view of disputed facts, minimizing the impact of ARCO's carcinogenic pollution on the Opportunity Citizens' properties. ARCO contends the arsenic on the Opportunity Citizens' properties is harmless based on EPA's acceptance of ARCO's 250 ppm cleanup level pursuant to CERCLA. ARCO's argument should be rejected for four reasons.

First, EPA's cleanup standard, based on statutory criteria set forth in CERCLA, is not relevant to the Opportunity Citizens' property damage claims under Montana common law. *Sunburst*, ¶¶ 59-80.

Second, at least 41 Opportunity Citizens currently live on property with soil exceeding the 250 ppm action level, based on ARCO's own litigation testing. Pl.s' Resp. to MSJ (App. 6:391-412).

Third, the protectiveness of the 250 ppm standard, and the hazardous nature of the arsenic on the Opportunity Citizens' properties, are hotly disputed. While ARCO is understandably thrilled that the EPA accepted ARCO's proposed 250 ppm cleanup level in Opportunity, its insistence that any lower concentration presents no harm to the property is not only disputed, but also patently wrong.

Finally, even though the Opportunity Citizens' experts have established a heightened risk of cancer, the Opportunity Citizens' common law property rights are not dependent on proof of a health threat from ARCO's pollution. In *Sunburst*, this Court held a property owner may recover restoration damages regardless of whether the pollution exceeds some regulatory standard. *Sunburst*, ¶ 59. The Court recognized allowing restoration damages to return a polluted property to its original condition preserves the fundamental constitutional right of all Montanans to a clean and healthful environment. *Sunburst*, ¶ 64. See also, Montana Constitution, Article II, § 16; *MEIC v. DEQ*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236. The District Court's conclusion that abatement is unreasonable as a matter of law was erroneous, both because the contamination presents a health threat, and because the contamination violates the Opportunity Citizens' common law property rights.

4. The Opportunity Citizens' properties can be abated quickly.

The Opportunity Citizens' remediation expert, John Kane, proposed soil removal and the installation of PRB walls to restore the Opportunity Citizens' property to pre-smelter conditions. Pl.s' Exp. Wit. Discl. (App. 2:72-73). Mr. Kane opined that restoration would take approximately 20 months. Pl.s' Exp. Wit. Discl. (App. 2:73). ARCO does not meaningfully dispute Mr. Kane's analysis. Certainly, a jury could conclude that 20 months is a reasonable time-frame to abate ARCO's pollution.

5. EPA approval is irrelevant.

Curiously, one of the grounds upon which the District Court relied in granting summary judgment to ARCO was "the Plaintiffs do not address how they could circumvent the requirement that the EPA approve their proposed abatement." Order (App. 11:667). Regulatory approval is not one of the factors set forth in *Burley* for evaluating the continuing nature of a nuisance or trespass.

In its brief in support of its motion for summary judgment, ARCO argued only briefly with respect to EPA approval. In its brief, ARCO states, without citation:

> Because Plaintiffs' properties are within a federal Superfund site, their proposed remediation cannot occur without prior EPA approval. Plaintiffs have no evidence of such approval and, given the inconsistency of their proposed soils remedy with EPA's selected remedy, they are unlikely to receive such approval.

ARCO's MSJ Br., pp. 22-23 (CR 308).

ARCO's argument is not persuasive for three reasons. First, CERCLA, from which the EPA derives its authority in Opportunity, does not affect the common law rights of citizens to bring private property claims and recover restoration damages. Quite to the contrary, CERCLA contains three separate savings provisions preserving the right to impose additional liability for the release of a hazardous substance. 42 U.S.C. § 9652(d); 42 U.S.C. § 9614(a); and 42 U.S.C. § 9607(j). Congress took every precaution to ensure that state law claims, such as those filed by the Opportunity Citizens here, would not be affected in any way by CERCLA. The District Court's ruling that the Opportunity Citizens' common law claims are dependent upon EPA approval runs contrary to the express intent of Congress.

Second, the soil cleanup proposed by the Opportunity Citizens and the EPA's acceptance of ARCO's recommended 250 ppm action level are not inconsistent. CERCLA "sets a floor, not a ceiling." *New Mexico v. Gen. Electric*, 467 F.3d 1223, 1246 (10th Cir. 2006). The Opportunity Citizens' state law claims do not seek to alter, hinder, or slow any portion of the EPA ordered cleanup. To the contrary, the Opportunity Citizens' proposed restoration remedy would further the EPA's ultimate goal, which is to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483

(1996). The District Court's assumption that EPA would or could prevent a property owner from cleaning up his or her own property, using funds awarded by a jury for that purpose, is speculative and unrealistic.

Various courts have allowed plaintiffs to recover restoration damages for property within contaminated sites carrying a Superfund designation. In *Samples v. Conoco, Inc.*, 165 F.Supp.2d 1303 (N.D.Fla. 2001), a group of landowners brought state law trespass, nuisance, and strict liability claims against corporate defendants for polluting the groundwater with hazardous chemicals. *Samples*, 165 F.Supp.2d at 1307. The EPA was simultaneously working to remediate the site. Under each count, the plaintiffs sought to recover damages including restoration costs. *Samples*, 165 F.Supp.2d at 1306-07. Because the claim brought in *Samples* was, like the claims in this case, a common law claim for restoration costs, the court rejected an argument identical to ARCO's argument in this case, and held CERCLA "does not affect a person's right to bring trespass or nuisance actions under state law for remedies within the control of state courts." *Samples*, 165 F.Supp.2d at 1316.

In another case, *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir. 1993), the district court awarded remediation damages in a pollution case brought pursuant to both CERCLA and California state tort law. *Stanton Road Associates*, 984 F.2d at 1021. The Ninth Circuit disallowed the restoration damages

under CERCLA, finding that such damages are recoverable only after a plaintiff has already incurred such costs in cleaning up his or her property. *Stanton Road Associates*, 984 F.2d at 1021. However, the court held the plaintiff was not prohibited from recovering future costs or repair damages under his state law trespass, negligence and nuisance claims. *Stanton Road Associates*, 984 F.2d at 1022.

Similarly, in *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1455 (1991), the Sixth Circuit held:

> CERCLA's legislative history, like the text of the statute itself, indicates that Congress never intended state environmental laws to be ignored or preempted in the selection of federal remedies.

Akzo, 949 F.2d at 1455. The court went on to quote Senator Mitchell's statements in the Congressional Record on the effect of the 1986 CERCLA amendments as follows:

> Clearly preserved, for example, are [...] actions to abate the hazardous substance release itself, independent of federal response action.

Akzo, 949 F.2d at 1455, quoting 132 Cong.Rec. §17, 212 (Oct. 17, 1986).

In *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 126 (3rd Cir. 1991), the court held that directives under New Jersey state law supplemented, rather than conflicted, with a CERCLA action. The court further held:

> Congress did not intend for CERCLA remedies to preempt complementary state remedies...

> [I]f CERCLA's remedies preempted state remedies for recovering costs of hazardous waste cleanups, § 114(b) (which prevents double recovery) would make no sense at all. Accordingly, we find no actual conflict between the DEP directives at issue in this case and the CERCLA provisions on which Manor Care relies.

Manor Care, 950 F.2d at 127.

Therefore, CERCLA is entirely irrelevant to the Opportunity Citizens' common law claims, and the District Court committed reversible error by determining that the Opportunity Citizens' claims were somehow barred because EPA did not provide advance approval for the Opportunity Citizens' damage claims.

Finally, this Court has previously rejected an identical argument offered by a polluter seeking to avoid restoration damages which were not approved by the State of Montana. In *Sunburst*, this Court held property owners can recover restoration damages for cleanup exceeding standards established by regulatory agencies, even where the cleanup methods proposed by the plaintiffs were previously rejected by the State of Montana DEQ:

> Thus, we agree with Sunburst that CECRA's focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law. Nothing in CECRA preempts a common law claim that seeks to recover restoration damages to remediate contamination beyond the statute's health-based standards.

Sunburst, ¶ 59. The District Court's conclusion that EPA must approve a common law restoration plan before damages are even awarded cannot be reconciled with *Sunburst*.

G. The continuing tort doctrine applies to the Opportunity Citizens' negligence, strict liability, wrongful occupation, and unjust enrichment claims, as well as their nuisance and trespass claims.

In a short portion of its order, the District Court states that application of the continuing tort doctrine must be limited to the Opportunity Citizens' nuisance and trespass claims, citing *Gomez v. State*, 1999 MT 67, 293 Mont. 531, 975 P.2d 1258. While this Court found the continuing tort doctrine inapplicable to the facts at issue in *Gomez*, it made no determination that the continuing tort doctrine cannot apply to a claim other than nuisance or trespass. In *Gomez*, the plaintiff sued the State of Montana under various theories, based on an occupational disease he developed while working for the City of Missoula. *Gomez*, ¶¶ 3-6. The plaintiff was treated for his disease as early as 1989, and four separate doctors expressed medical opinions that his condition was related to chemical exposure in his workplace. In August of 1992, the plaintiff's condition was determined to be compensable as an occupational disease. He terminated his employment with the City a few months later and waited until April, 1996, to file his lawsuit against the State. Only the plaintiff's final day of employment with the City was within the limitations period for the claims he

asserted. Although he was diagnosed with a disease linked to his exposure months earlier, the plaintiff argued the State committed continuing torts by exposing him to chemicals on the final day of his employment. *Gomez,* ¶¶ 4-6, 13.

Under the circumstances, the Court declined to apply the continuing tort doctrine. The Court distinguished the injuries the plaintiff suffered from the injuries at issue in *Graveley* and *Shors*. The plaintiff was already ill and no longer being exposed to the chemicals he claimed gave rise to his condition. No ongoing harm requiring abatement or removal even existed.

In the property damage context, the basis for the continuing tort doctrine is that failure to abate a removable nuisance, or failure to remove a trespassing object, is an ongoing wrongful act. *Graveley*, 240 Mont. at 24, 782 P.2d at 374. In this case, the primary damages at issue are restoration damages, intended to discontinue ARCO's wrongful invasion of the Opportunity Citizens' properties. *Gomez* is factually and legally distinct and has no application to the present case.

The harm caused by the conduct giving rise to all of the Opportunity Citizens' claims is the continued presence of pollution on their properties. When a party causes an object to enter the property of another, through negligent conduct or through abnormally dangerous activity giving rise to strict liability, the party is liable for trespass. *Guenther v. Finley*, 236 Mont. 422, 425, 769 P.2d 717, 719 (1989);

Restatement (Second) of Torts, § 165. The Opportunity Citizens' negligence and strict liability claims are, therefore, inextricably intertwined with their trespass claim, and must be evaluated together therewith for purposes of the continuing tort doctrine. Likewise, the basis for the continuing tort doctrine, holding a responsible party continuously liable for the failure to remove abatable pollution from the property of another, applies equally to the Opportunity Citizens' wrongful occupation and unjust enrichment claims. Although this Court has not yet analyzed the continuing tort doctrine in the context of a wrongful occupation or unjust enrichment claim, the Montana Eighth Judicial District Court has held the theory applicable under identical circumstances. Pl.s' Resp. to MSJ (App. 7:563-564).

II. Genuine issues of fact concerning when the Opportunity Citizens knew or should have known ARCO harmed their property preclude summary judgment.

The Opportunity Citizens assert tort claims, under Montana state law, for damage to their real property. Section 27-2-207, MCA, provides a two year statute of limitations for claims arising from injuries to property. However, § 27-2-204, MCA, provides a three year statute of limitations for tort claims. This Court has resolved the conflict between the statutes in favor of the more liberal three year statute of limitations. Thus, under Montana law, the statute of limitations for a tort

claim involving injury to property is three years. *Ritland v. Rowe*, 260 Mont. 453, 458-59, 861 P.2d 175, 178-79 (1993).

The statute of limitations does not begin to run on a claim for damages which are self-concealing until the plaintiff discovers or should have discovered "the facts constituting the claim." §27-2-102(3)(a), MCA. The Opportunity Citizens filed their claims on April 17, 2008. Thus, to prevail on its defense, ARCO must prove the Opportunity Citizens knew, or should have known, of the facts constituting their claims before April 17, 2005. Contrary to ARCO's contentions relied upon by the District Court, the Opportunity Citizens were not aware of the facts giving rise to their claims more than three years before filing suit. Whether any of the Opportunity Citizens should have known of the facts constituting their claims earlier is a highly factual inquiry inappropriate for summary judgment.

A. ARCO has not demonstrated that any Opportunity Citizen knew the facts giving rise to his or her claim outside the limitations period.

As the party moving for summary judgment, ARCO had the burden to demonstrate the absence of genuine issues of material fact, and all reasonable inferences that may be drawn from the evidence must be drawn in the Opportunity Citizens' favor. *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, ¶ 11, 361 Mont. 241, 257 P.3d 383. Under Montana law, knowledge of a self-concealing injury,

sufficient to trigger the statue of limitations, requires knowledge of both the injury and its cause. *Hando v. PPG Industries, Inc.*, 236 Mont. 493, 501-02, 771 P.2d 956, 961-62 (1989). ARCO inundated the District Court with thousands of pages of exhibits, proving most of the Opportunity Citizens were aware the Anaconda Company smelted copper in Anaconda, Montana, and were further aware the operation resulted in some environmental damage in the area. However, ARCO failed to demonstrate that any of the Opportunity Citizens knew, or should have known, their properties were contaminated by arsenic and other pollutants.

The Opportunity Citizens' claims are all based on damage to **their properties**, caused by the migration of pollution from ARCO's operations. Third Amended Complaint (CR 140). Knowledge of the facts constituting the claims would necessarily include knowledge that ARCO's pollution harmed each Opportunity Citizen's individual property. With respect to the individual Opportunity Citizens, ARCO cited no evidence at all to suggest they knew, or had any means of knowing, whether contamination existed on their properties. ARCO did sample soil on some of the Opportunity Citizens' properties before 2005, and it provided documents to some of those citizens reporting sampling results. However, to ascertain whether their properties were contaminated, in addition to sampling results, the Opportunity Citizens would need information concerning the background levels of arsenic in the

area, which ARCO did not provide. ARCO never informed any Opportunity Citizens that arsenic levels on their properties were elevated above background concentrations. Instead, ARCO merely advised those few Opportunity Citizens who received sampling results that their properties had no problems from arsenic contamination. Pl.s' Resp. to MSJ (App. 5:249-379).

The District Court concluded the discovery rule does not apply to the circumstances of this case, finding soil and groundwater pollution from arsenic and other metals is not self-concealing. In support of its conclusion, the Court noted many of the Opportunity Citizens saw smoke emanating from the stack while growing up in Opportunity. Of course, without the benefit of highly technical, and prohibitively expensive, environmental sampling, the Opportunity Citizens had no means of determining what, if any, material from the stack settled and remained on their property after many years.

The District Court cited a Montana federal district court decision, *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F.Supp. 1339 (D.Mont. 1991), for the proposition that the discovery rule does not apply unless discovery of the claim at issue is "virtually impossible." Order (App. 11:665). This Court has never endorsed the "virtual impossibility" standard imposed by the District Court. The purpose of the discovery doctrine is to prevent the harsh result of barring plaintiffs'

claims before they even know the claims exist. *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 78, 951 P.2d 1, 12 (1997). Thus, this Court has held claims based on information which cannot be discovered absent specialized inquiry are, by their nature, self-concealing. *Blackburn*, 286 Mont. at 79, 951 P.2d at 12. The existence of environmental contamination, such as arsenic in soil and groundwater, cannot be ascertained absent specialized testing.

As nearly every Opportunity Citizen confirmed in his or her deposition, arsenic contamination in soil and groundwater cannot be seen, smelled, or tasted. Pl.s' Resp. to MSJ (App. 7:424). Based on the District Court's reasoning, any property owner who can see smoke produced at a nearby industrial facility must know, without any testing or expert analysis, that the facility has polluted his or her property. Invisible pollution, which cannot be detected absent environmental sampling and laboratory analysis, is, without question, self-concealing.

In response to interrogatories, all of the Opportunity Citizens confirmed they were not aware of pollution impacting their properties more than three years before filing suit. Pl.s' Resp. to MSJ (App. 7:426-560). Most of the Opportunity Citizens also confirmed their lack of understanding the impacts to their property in their depositions. Pl.s' Resp. to MSJ (App. 7:578-607). While some Opportunity Citizens

testified they "suspected" ARCO's activity may have harmed their properties, they had no means of discovering whether their fears were well-founded.

B. Whether certain Opportunity Citizens should have known the facts constituting their claims outside the limitations period is a question of fact, which cannot be resolved on summary judgment.

Lacking evidence that any of the Opportunity Citizens knew or understood how their properties had been polluted, ARCO insisted to the District Court that all of the Opportunity Citizens had inquiry notice of their claims before 2005. Whether a plaintiff should have known earlier of his or her claim is a question of fact for the jury. *Blackburn*, 286 Mont. at 79-80, 951 P.2d at 12-13. The sheer volume of material ARCO submitted to the Court in support of its motion illustrates the highly factual nature of the issue. The overwhelming majority of information referenced in ARCO's briefs, and attached in its thousands of pages of exhibits, related to environmental sampling and cleanup activity in areas other than the community of Opportunity. Many of the Opportunity Citizens were aware of highly publicized environmental cleanup activities, such as the Berkeley Pit, Silver Bow Creek, and the Old Works. Aside from the limited sampling referenced above, after which ARCO advised certain Opportunity Citizens their properties were clean, nothing ARCO relies upon provided information about the conditions on any citizen's property.

In 1996, based on limited sampling conducted in Opportunity, ARCO represented that the surface soil in Opportunity did not contain elevated arsenic. Pl.s' Resp. MSJ (App. 7:568-577). In public meetings around the same time, ARCO representatives advised the community was not at risk. Pl.s' Resp. to MIL No. 4 (App. 9:624). Thus, ARCO actually conducted an investigation and misrepresented the community was clean. The true condition of the properties was never ascertained until thorough sampling was performed as a result of this lawsuit.

While noting some Opportunity Citizens knew the Butte/Anaconda area was a Superfund site, ARCO ignores the fact that certain Opportunity Citizens had no comprehension of what a Superfund site is:

> Q. Do you understand that the Anaconda area is an EPA Superfund site?
>
> A. Yeah, I have heard that, yes.
>
> Q. Did you understand that that meant there was environmental testing and cleanup going on in the area?
>
> A. I don't know. I have too many questions in my head.
>
> Q. What did you believe the term Superfund site meant?
>
> A. I guess I don't know.

Pl.s' Resp. to MSJ (App. 7:608-613).

ARCO also places significant emphasis on media coverage of contamination in the area. While producing a handful of articles discussing waste disposal in the Opportunity ponds, an area which is not the subject of this action, ARCO has not identified any media coverage which disclosed the presence of pollution on any Opportunity Citizens' property. The existence of publicity does not establish that a plaintiff should have known the contents thereof. *Migliori v. Boeing North America, Inc.*, 97 F.Supp.2d 1001, 1011 (C.D.Cal. 2000). Even in jurisdictions where publicity can be considered as knowledge a reasonable person should ascertain, courts must consider the quality and quantity of the information, as well as the characteristics of the plaintiffs involved. *Migliori*, 97 F.Supp.2d at 1011; *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123 (9th Cir. 1994); *Bibeau v. Pacific Northwest Research Foundation Corp.*, 188 F.3d 1105, 1110 (9th Cir. 1999). Beyond generally referencing news coverage, ARCO has made no showing as to what any particular citizen should have learned about the damage to his or her property from publicity.

The District Court also mentioned in its Order that certain ranchers filed a lawsuit in 1905, *Bliss v. Anaconda Copper Mining Co.*, 167 F. 432 (D. Mont. 1909), seeking damages and injunctive relief on the basis that smelter emissions were harming livestock. Order (App. 11:663). However, there is no evidence suggesting any individual Opportunity Citizen knew of the *Bliss* case. The District Court clearly

erred by imputing knowledge of a 100 year-old lawsuit, involving different issues, to the Opportunity Citizens.

The District Court also concluded, without any citation to the record, that "Plaintiffs' own experts concede that there was almost universal notice of the potential toxicity of metals emitted from the smelter soon after the onset of its operations." Order (App. 11:663). The Court misinterpreted Dr. Pleus' expert witness disclosure, which states:

> Anaconda smelter officials could have anticipated during the late 19th and early 20th centuries that the arsenic and lead the company left behind in the environment from operation of the Anaconda Smelter could present a public health and/or environmental risk.

Pl.s' Exp. Wit. Discl. (App. 2:189). Dr. Pleus' report is entirely devoted to the information available to the smelter industry through various studies. However, ARCO has never demonstrated that any of the Opportunity Citizens were privy to the same information available to industry insiders.

The District Court determined certain Opportunity Citizens should have known of their claims because ARCO recorded an easement to pollute (which is the subject of cross-motions pending before the District Court) in their chain of title. Importantly, the easement referenced by the District Court was not actually included in the Opportunity Citizens' deeds. The easement traces back to 1914, when the Anaconda

Company owned property that was later conveyed to 61 of the Opportunity Citizens in this case. The Anaconda Company conveyed the property to Deer Lodge Valley Farms Company (Farms Company) for the nominal consideration of $1.00. ARCO's MSJ Br., Ex. C, pp. 2-3, Ex. B (CR 267); 1914 Grant Deed (dated May 1, 1914; recorded May 7, 1914). The Anaconda Company's deed to the Farms Company contains the language from which ARCO contends the easement to pollute arises.

The Farms Company then sold the land to individual buyers, who are predecessors in interest to the Opportunity Citizens. The Farms Company did not include the easement language in any of the deeds. ARCO's MSJ Br., Ex. C, p. 3 (CR 267). Only if the individual Opportunity Citizens undertook their own title search at the county courthouse and traced their title back to 1914 would they be aware of the easement. None of the Opportunity Citizens have conducted such a search.

Even if the Opportunity Citizens should have known of ARCO's easement, the easement provides no information concerning the current condition of any citizen's property. First, while the easement purports to give the Anaconda Company a right to pollute *the atmosphere*, it makes no reference to the pollution of soil or groundwater. ARCO's MSJ Br. (CR 267). Second, even if the easement did authorize the pollution of soil or groundwater on the Opportunity Citizens' property,

its existence dating back to 1914 provided no information whatsoever concerning the current condition of the Opportunity Citizens' property.

In Montana, a plaintiff is not charged with inquiry notice of a claim, absent some reasonable means of discovering the harm giving rise to the claim. *Strom v. Logan*, 2001 MT 30, ¶15-18, 304 Mont. 176, 18 P.3d 1024. Discovery of environmental damage, like the damage involved in this case, is particularly complex and prohibitively expensive. Thus, some jurisdictions apply the discovery doctrine broadly to environmental torts. See *In re Tutu Wells Contamination Litigation*, 909 F.Supp. 980, 986-87 (D.V.I. 1995); *Taygeta Corp. v. Varian Assocs., Inc.*, 763 N.E.2d 1053, 1062 (Mass. 2002). In *In re Tutu*, the court adopted what it characterized as the "environmental discovery rule" tolling the statute of limitations until the plaintiff either knows or should know significant facts concerning the environmental injury and its cause. The court justified its holding as follows:

> . . .the court finds that such a rule is dictated in the relatively limited context of environmental torts for several reasons. First, our society has recently come to recognize that if our environment is to survive, it must be protected from those who would otherwise abuse or destroy it. . . Further, it is entirely fitting that such a law should apply in the Virgin Islands where the environment is such an integral part of both the lives of the citizens and the economy. Second, the various harms and injuries arising from environmental contaminants are often slow to arise given the latent nature of many such contaminants. . . Finally, a broad environmental discovery rule avoids the possibility of under-deterring conduct which results in environmental contamination.

In Re Tutu, 909 F.Supp. at 986-87. The Supreme Court of Massachusetts adopted a similar policy in *Taygeta*:

> A plaintiff who brings a cause of action for property damage under G.L. c. 21E has no duty to investigate whether its property may have been contaminated by another. Rather, it is the owner or operator of a site from which there has been a release of hazardous material, or other person who caused or is legally responsible for such a release, that must investigate, assess, and delineate the geographic scope of the contamination, including its possible migration from the point of origin. Generally speaking, it is not until this process provides definitive information that hazardous material has migrated from its original site and contaminated other properties, and the owners of such other properties receive actual knowledge of their own contamination, that they will have discovered their damages and the cause thereof. At that point, the statute of limitations begins to run.

Taygeta, 763 N.E.2d at 1061-62.

Given Montana's strong policy of environmental protection as reflected in Article II, § 3 of the Montana Constitution, and ARCO's long-standing duty to assess the extent of its contamination, the Court should likewise apply the discovery doctrine broadly in this case. None of the Opportunity Citizens had actual knowledge of the harm to their property outside the limitations period. When evaluating the highly individual and factually intense question of when the Opportunity Citizens should have learned their property was polluted, the Court and jury should consider the complexities of environmental investigation. Ultimately, the trier of fact should

decide, based on all of the evidence, when the Opportunity Citizens possessed sufficient knowledge of ARCO's invisible and toxic pollution on their properties.

CONCLUSION

The Opportunity Citizens respectfully request an order reversing the District Court and holding ARCO's statute of limitations defense cannot be resolved on summary judgment. Under Montana law and the circumstances of this case, the jury must determine both whether the continuing tort doctrine applies, and whether the discovery rule defeats ARCO's statute of limitations defense.

DATED this 9th day of June, 2014.

LEWIS, SLOVAK & KOVACICH, P.C.

By: _____

Mark M. Kovacich
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Appellants

BECK & AMSDEN, PLLC

By: _____

Justin P. Stalpes
1946 Stadium Drive, Suite 1
Bozeman, MT 59715
Attorneys for Appellants

CERTIFICATE OF SERVICE

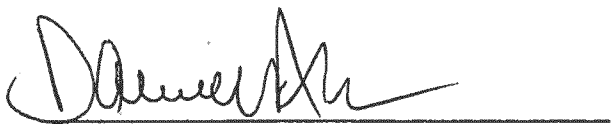
I hereby certify that a true and legible copy of the foregoing **Appellants' Brief** was served on the 9th day of June, 2014, postage prepaid thereon by first class mail, upon the following:

John P. Davis
POORE, ROTH & ROBINSON, P.C.
P.O. Box 2000
Butte, MT 59702

Michael J. Gallagher
Shannon Wells Stevenson
Jonathan W. Rauchway
Mark Champoux
DAVIS, GRAHAM & STUBBS, LLP
1550 17th Street, Suite 500
Denver, CO 80202

Monte D. Beck
Justin P. Stalpes
Lindsay C. Beck
BECK & AMSDEN, PLLC
1946 Stadium Drive, Suite 1
Bozeman, MT 59715

DATED this 9th day of June, 2014.



CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count, calculated by WordPerfect X3, is not more than 10,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 9th day of June, 2014.

LEWIS, SLOVAK & KOVACICH, P.C.
and
BECK & AMSDEN, PLLC

By: _____

Mark M. Kovacich
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Appellants